SOME OBSERVATIONS ON THE PRIMARY AND ELECTION LAWS OF THE STATE OF NEW YORK WITH SPECIAL REFERENCE TO THE NOMINATION AND ELECTION OF JUDGES

PAPER READ AT THE MEETING OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

MARCH 10, 1914

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THE KNICKERBOCKER PRESS
(G. P. PUTNAM'S SONS)
NEW YORK

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I. The Change to an Elective Judiciary.

The wave of democracy that swept over America in the thirties and forties of the last century proceeded upon the theory that the direct vote of the people was a panacea for political ills, and left in its wake a series of popular elections at short intervals for a multiplicity of candidates. The new creed was that it was desirable to make every public officer directly responsible to the citizens, and that to accomplish this he must be elected by all the voters, and his term of office must be short. This doctrine was extended to include the judiciary. Accordingly the New York constitution of 1846, following a general movement already well under way in other states, made two radical changes in the constitution of the New York courts. Abandoning the system of an appointive judiciary theretofore in effect (save only for the senatorial members of the old Court for the Trial of Impeachments and the Correction of Errors, who had seats in that court by virtue of their election to the Senate), the new constitu-

tion made the judiciary generally elective and also substituted for a tenure during good behavior a short and fixed term of eight years. Mr. J. Hampden Dougherty in his *Constitutional History of New York** characterizes this change in the constitution of the courts as the most radical change proposed by the convention of 1846.

The work of a convention which spent the greater part of twenty-three days in discussing the question how long a citizen must be a resident of the state in order to be eligible for the office of governor, may well be approached without enthusiasm. But whatever the merits of the new plan, it was popular. Twelve states had already adopted it, and nearly as many more afterwards followed New York in their train. So that by 1860, more than two-thirds of the then states (24 out of 34), to a greater or less extent, had committed themselves to the policy of an elective judiciary. Since then considerable reaction against this movement has manifested itself; although so far as New York is concerned such reaction has been under the surface and has not led to any formal abandonment of the elective principle.

But by 1867 even the man in the street was prepared to abandon the short judicial term. In the New York constitutional convention of 1867 a majority of the committee on the judiciary went further, and, though not recommending the abandonment of an elective judiciary, reported in favor of the election of judges who should hold office during good behavior or until the age of 70 had been reached. Their report proposed further that at the general election in 1870 there should be a referendum to the people upon the question whether vacancies in the principal courts, as they should thereafter occur, should be filled by the governor with the advice and consent of the Senate. The convention, indeed, did not lack those who advocated an out-and-out return to the appointive system; for lawyers and judges of the highest character did not hesitate to attack both the theory and practical results of the 1846 system, and urge its complete abandonment. But in the end the elective theory won, with still a fixed, but lengthened term.

* Vol. II., of Chester s Legal and Judicial Hist. of N. Y., National Americana Socy., 1911.

The judiciary article was submitted to popular vote separately from the rest of the constitution, and was adopted by a majority of less than 7000 in a total vote of 487,000—a difference in its favor of less than one and one-half per cent. It is only fair to say, however, that the real sentiment in its favor was greater than appears from these figures; for the constitution as a whole was voted down by more than 66,000, or thirteen per cent. of the total vote.

By some curious process of reasoning, the convention of 1867, although itself recommending a continuance of the elective system and providing that a popular vote should be taken upon such recommendation in connection with the whole constitution (in 1869), had provided for a re-submission of the same question to the people in 1873. This time the popular majority for the elective system was upwards of 200,000—a difference between the majority and minority of forty-eight per cent. of the total vote upon the question. Somewhat less popular interest in the matter was, indeed, shown than had been shown four years before, for the total vote on the question was substantially smaller, and this in spite of the general political excitement following the Tweed-ring disclosures, in which members of the judiciary were involved; but still the vote indicated that the general public was overwhelmingly in favor of an elective judiciary.

As a consequence of the failure of the work of the 1867 convention, aside from the judiciary article, to receive popular approval, the constitution of 1846 was not succeeded by another general revision until 1894. And in that convention, in view of the emphatic vote of 1873, the question of a return to the appointive system was hardly discussed.

It must be admitted, however, that in the last twenty years an increasing body of students of judicial systems has arisen to deny the soundness of the theory of 1846. In a somewhat different field, but under the impulse of a similar principle, the movement to rid the general electorate of a task for which it is ill-fitted—the selection of public servants requiring special knowledge and technical training—has gone on apace. Largely because the country has been made ready for it by bitter experience, but also partly because of the happy accident (or rather the art

which conceals itself) of its name, the Short Ballot movement has attained in a few years a momentum which bids fair to revolutionize state and municipal administrations throughout the country. Whether this movement is to include the judiciary generally, as did the opposite movement of seventy years ago, remains to be seen.

Of course the question of elective or appointive judges is but one of many problems confronting the draftsmen of a judiciary article. The proper number, size, organization and jurisdiction, original and appellate, of the many courts which go to make up our varied system are questions upon which there has always been much difference of opinion; and those familiar with the proceedings of constitutional conventions know what weary days are devoted by every constitutional convention to the consideration of these problems. But important and difficult as these questions are, they are aside from the present purpose.

I have thus briefly reviewed the general outlines of the case of Appointive Judiciary *versus* Elective, as it is recorded in the constitutional history of New York, not so much for the purpose of pointing out that the problem is one that may still be fairly said to be alive, and likely to confront succeeding constitutional conventions with greater insistence than it did the last, as by way of recalling the more general point of view from which particular problems inherent in an elective judiciary are to be considered. It will not do to assume lightly that our present way of nominating and electing judicial candidates is the only way, or even the best way; and we lawyers will not discharge our full duty toward our profession if we allow habit and inertia to obstruct serious consideration of suggested reforms.

II. Our Present Elective System.

Coming now to our present system itself—the election system by which we undertake to select judges by popular vote:

Let no one worry lest he be here subjected to a detailed analysis of a law which our courts have criticised for its length and complexity, and which the Court of Appeals once admitted that

it itself found difficult to understand*—a statement which—would it be too irreverent to say?—seems to find confirmation in some of the decisions upon this perplexing subject. Interesting as the details and workings of our necessarily complicated electoral system are to those who take part in their practical application, I shall ask you to consider only the general theory and outline of the system; and these are simple. Pardon me if I here traverse somewhat familiar ground. Let the new primary and ballot amendments of last December† be my excuse.

The primary used to be an election within a party at which representatives of its members were selected who were charged with the duty of conferring together and selecting party candidates to make the race at the general election. But when this system degenerated everywhere, and apparently hopelessly, into a method of placing a meaningless rubber-stamp approval upon candidates really selected by political bosses and oligarchies largely for personal or pecuniary reasons, and in the face of public needs, the system was doomed and the direct nominations wave inevitable. This wave has now nearly swept the country, until more than forty of our forty-eight states nominate by such a system, applying it to elective officers in greater or less degree.

The New York system follows the usual type of direct nominations systems, it being a two-bites-at-the-cherry system of choice. A primary election is held at which the final contestants (subject to the possible addition of certain independent candidates) are selected by the recognized political parties. Following this is held the secondary election, which we are accustomed to refer to as "*the* election," at which the ultimately successful

* *People ex rel. Feeny* v. *Board of Canvassers*, 156 N. Y., 36; 45; decided in 1898. The revision or "consolidation" of the Election Law in 1909 (L. 1909, chap. 22) cleared up some difficulties in expression, but made no change in substance; the revision, however, by consolidating several statutes into one, made the statute much longer than before. Subsequent amendments, some carelessly made, have introduced fresh difficulties; but by the recent adoption of the "Massachusetts" or office-group form of ballot as a substitute for the party-column form of ballot (L. 1913, chap. 821), the method of voting has been much simplified.

† L. 1913, chap. 820, as to the primary; chap. 821, as to the form of ballot, etc.

candidates are chosen for public office. Under this system, by virtue of the limitation upon each political party to a single candidate for each vacancy, the primary operates to limit more or less arbitrarily—but for practical reasons—the number of candidates among whom must fall the final choice. Its function is thus much like that of a rule of evidence—it excludes what in logic and reason would be relevant.

No distinction is made in the New York law between judicial and other candidates, either at the primary or at the general election. With governors, mayors, legislative representatives, state and municipal fiscal officers, state engineers, and coroners, the judges—and the state—take their chances with the electorate's somewhat undisciplined instinct for natural selection.

Nominations for the primary, or "designations" as they are called, to distinguish them from nominations *by* the primary for the November or "general" election, in the case of judges, as for all other candidates, may now be made only by certificate or "petition" signed by a certain number of voters of the district. This is simply an application to the primary of the system with which we have become familiar in connection with "independent" nominations for the general election, in other states sometimes called a "nomination paper." The new law has abrogated the right of party committees to act as nominating committees for their own parties, subject to the recall of injudicious decisions on the part of the committees and the substitution of other candidates by vote of the party itself at the primary. That was a function bestowed by the somewhat ill-starred primary legislation of 1911, and was a feature of that law which never received, and, indeed, under the circumstances was incapable of receiving, a fair test. The new law, however, puts all factions and candidates upon a theoretical parity, and recognizes no candidate who does not present the required number of signatures appended to his paper, whether they have been subscribed, without inquiry, in Harmony Hall, or painfully collected one by one in the uncongested neighborhood of the Uplift Club.

The primary election is, of course, limited to the recognized "political parties," viz., parties that have cast 10,000 votes for a governor at the preceding gubernatorial election. In other words

(subject to a qualification to be made later), each party holds its own elimination contest within and for itself. As a natural consequence, no voter may sign a designating petition unless he be an enrolled member of the party for whose primary the designation is intended.

Under the new statute (Election Law § 48, as amended by L. 1913, chap. 820) designating petitions must be signed by at least three per cent. of the enrolled voters of that party within the political division for which the designation is made, which requirement, however, is reduced for certain large divisions described in the act, by the fixing of certain *maxima* which the number of signatures need not exceed even though such number be less than the three per cent.

Unfortunately these absolute figures (which are thus both *maxima* and *minima*) for districts less than the state apply principally to entire counties and cities, and to senatorial and assembly districts, with which but a few judicial districts coincide, leaving the indefinite three per cent. requirement to operate upon a large number of important judicial nominations. The following will illustrate how some of these provisions operate. The enrollment figures are those of the present enrollments (general enrollment of October, 1913) and take no account of any names which may be added to the party lists under any supplemental enrollment which may occur prior to the autumn primary of 1914.

GENERAL ENROLLMENT OF OCTOBER, 1913.*

	Democratic Party	Republican Party	Progressive Party
New York County	132,693	56,108	19,705
Bronx "	43,097	15,323	6,252
1st Judicial Dist.	175,790	71,431	25,957

* From annual report of the Board of Elections of the City of New York for 1913, for New York, Bronx, Kings, Queens and Richmond Counties; from the records of the Boards of Elections for Nassau and Suffolk.

	Democratic Party	Republican Party	Progressive Party
Kings County	123,711	72,036	15,786
Queens "	40,289	9,686	3,022
Richmond "	9,800	3,918	883
Nassau "	6,036	5,314	1,337
Suffolk "	6,156	5,540	1,248
2nd Judicial Dist.	185,992	96,494	22,276

Applying the three per cent. requirement, as modified by the *maxima* provided for certain districts (1000 signatures in a county containing more than 250,000 inhabitants; 500 in a county containing more than 25,000 inhabitants and not more than 250,000; Richmond is the only New York City county to come within the latter class; Nassau and Suffolk are also in the second class), the following is the result:

NUMBER OF SIGNATURES REQUIRED TO DESIGNATE THE FOLLOWING JUDICIAL CANDIDATES FOR THE PRIMARY.

	Democratic Party	Republican Party	Progressive Party
J. of Genl. Sessions, N. Y. Co.	1,000	1,000	592
County Judge, Kings Co.	1,000	1,000	474
Supreme Ct. J., 1st Judic. Dist.	5,274	2,143	779
" " " 2nd " "	5,580	2,895	669

As § 48 of the Election Law (as amended by L. 1913, chap. 820) now requires only 3,000 signatures to designate for the primary candidates for the offices of United States senator, governor, and judge of the Court of Appeals (any candidate to be voted for by the entire state), the above requirements for justices of the Supreme Court in the first and second judicial districts strike one as distinctly onerous, and also as creating a special handicap for all but the designees of the party machines.

I said that each party held its primary within and for itself. It is conceivable that in the future the partisan character of

judicial candidates may become so negligible that we may hold a judicial primary which shall be solely an elimination contest, without recognition of parties, and in which members of all parties shall join, as is already the case in many states with respect to certain municipal nominations, and has already been urged in the New York legislature.* Indeed, prior to our own latest municipal election (1913), members of various parties were carried to successful nomination at the primaries of others, of course, by the ballots of voters enrolled in such other parties, under the pressure of an extraordinary public opinion. But should the time arrive when a non-partisan judicial primary becomes a possibility, the same change of viewpoint might as conceivably bring about an end to the effort to make judicial nominations by popular vote. However that may be, to date, all primaries in New York have been strictly family affairs, within and for the separate parties. Yet this is true only in one sense, viz., that all rivalries and contests at the primary are limited to opposing factions within the party itself. The party organizations have not, theoretically at least, free control of the primary machinery. For upwards of fifteen years, the party primaries have been subject to more or less regulation, and have been conducted more or less in public. Under the new law, as under the old, the same officers that conduct the November election are divided between two polling places, at one of which the officers representing the dominant political party of the moment, as determined by the last preceding gubernatorial vote, conduct the primary for their own party, combining for the purpose two adjoining election dis-

* Of the 48 states about 30 already provide for non-partisan elections, or non-partisan primaries and elections, for municipal officers within one or more cities, mostly, but not exclusively, in connection with the commission forms of municipal governments. Since the paper was read New York has joined the list. The new charter for the city of Buffalo (L. 1914, chap. 217) provides for a non-partisan primary and election for mayor and councilmen; and the new charter for the city of Olean (L. 1914, chap. 436) provides for the non-partisan election of the commissioners upon a ballot permitting the indication of first, second and third choices. With this rapidly growing recognition of non-partisanship in connection with municipal elections, may we not hope that the same principle will soon be extended to include the judiciary?

tricts and their respective election officers, and at the other of which polling places the election officers of the other party represented in the division of election officers hold the primaries or itself and all the lesser parties, likewise for two election districts. Since 1911 an official ballot has been required for the primary with other safeguards to which we are accustomed in connection with the November election. But no change has as yet been made in the division of the election officers between two polling places, or in the uneven distribution of their labor, although there are bills in the present legislature to abrogate these somewhat anomalous provisions, and provide a polling place in each election district at which the primaries of *all* parties in that district will be held by the same bi-partisan board that is to serve at the following election. A bi-partisan board is less likely to lend itself to frauds than a board where all members represent one party machine; and it is obvious that the present primary system omits one important check provided for the general election.

In line with the general tendency to conduct the primary election in the same manner as the November election, and to invest it with the same safeguards, is the provision of the present law that factional contests within the parties over the validity of designating petitions and like matters, shall be determined according to the same method as has for many years been prescribed for the November elections, i. e., by appeal to the courts.

In connection with these appeals of pre-election controversies two points of special interest to the lawyer may be noted in passing. All such hearings are of an exceedingly summary character; by common consent proofs are less technical than usual, red-tape is cut in all directions, and appeals are expedited in flagrant violation of all judicial speed laws. The second point of interest is that, in a technical sense, cases are decided before they arise, and respondents are given directions with respect to future and somewhat contingent events; in other words, before the time has arrived when there can be any refusal or default under the Election Law predicated. For example, a commissioner of elections says that he intends to make up a ballot for election day in a particular way which is claimed by a candidate or party representative to be contrary to the requirement of the Election

Law; or perchance the commissioner refuses to say what he intends to do; under the usual rule governing such cases, as all are aware, the time must come for the doing of the act, and the violation of duty must occur, before the courts will step in to compel the performance of the disregarded obligation. "In spite of the respondent's declarations or silence," the courts say, "he may, nevertheless, do his duty when the occasion arrives. Let us wait and see." But not so in election cases. Here the courts take the common-sense view that a large public interest is involved; that to postpone the consideration of such a case until the moment for action has arrived, a few days before the election, would be in effect a denial of relief; and accordingly election cases of the character of the supposed case are made exceptions to the general rule, and are decided in one sense in advance.*

We come now to one very important change worked by the December legislation. I refer to the form of the ballot both at the primary and at the general election. The fourteen- and nine-foot ballots at the primary imposed on us by the so-called Direct-Primary Act of 1911, naturally did not survive longer than a single trial, and led to some re-arrangement for the succeeding primary. But the new laws do away entirely with the *faction*-column ballot for the party primary, just as they do away with the *party*-column ballot for the November election. For both elections there is now prescribed an office-group ballot, slightly different from the Massachusetts type, but still requiring every candidate voted for to be made the subject of an affirmative act of choice by a separate and individual mark. Miniature emblems opposite the individual names sprinkle the general ballot with the spores of the straight-voting influenza; but it does not seem improbable that these will disappear in time. They are really unnecessary. A simple Arabic numeral opposite the name of each candidate, beginning with 1, and continuing to the last candidate on the ballot, plus the existing provisions for assistance to the voter who cannot read *figures* (an exceedingly rare bird), should suffice; and this is the system already adopted for the *primary* ballot. It may interest some to know that New York is the only direct-nominations state that was ever so misguided

* *People ex rel. Hotchkiss* v. *Smith*, 206 N. Y., 231; 241, and cases cited.

as to attempt the use of the faction-column ballot in its primarie
The bench and bar are to be doubly congratulated that a singl
day last December should mark the end, for both primaries an
general elections, of a ballot which by its form placed an un
professional emphasis upon the partisan character of judicia
candidates.

The abolition of the party-column method of voting for judge
has been, for years, the subject of special effort on the part o
the New York State Bar Association. To that end that Associa
tion has urged legislation to take judicial candidates out of th
party-columns on ballots and voting machines, and to grou
their names alphabetically under each judicial office to be fille
either upon a separate ballot, or at least in a separate colum
or division of the blanket ballot, and, of course, in a separat
column on the voting machine. Our own Association* has o
two different occasions gone on record as being in accord wit
the State Bar Association in this regard. While the new la
does not accomplish all that the State Bar Association aimed a
in freeing judicial candidates from political association, in tha
under the new law the party names and emblems are still attache
to these candidates precisely as they are to others, the Sta
Bar Association, at its recent meeting in January, determined
give the new ballot a trial before urging further modificatio

Although our new form of ballot has given satisfaction f
twenty-five years in Massachusetts, and for lesser periods in te
or a dozen other states, one is naturally interested in the questio
How will it work in New York?

Already one small election in our state has been held und
it. On January 6, 1914, the village of Owego, in Tioga Count
held its annual election, and while fault is found with the leng
of time taken by the new method of counting (a method whic
may easily be modified to meet the objection),† the new *ball*
seems to be favorably regarded. Nearly 1100 ballots—two an
one-half times the number of ballots cast at a typical New Yo
City polls—were cast at the single voting place in the village

* See annual report of the Judiciary Committee of this Association f
1912, pp. 165–66 of 1913 year book.

† L. 1914, chap. 244, has since modified the method of counting.

a period of five hours—less than one-half the time allowed at a general election. It is true that the ballot was comparatively short and simple both with respect to the number of offices to be filled (only nine different offices) and the number of candidates for each office (only two for each office); but as against this should be weighed the novelty of the form, in spite of which the statement is made that there were fewer spoiled ballots than usual.

Of course, it remains to be seen what effect the new form of ballot will ultimately have in New York in encouraging a discriminating choice as between judicial candidates. It is safe to predict that the number of votes actually cast for such candidates will fall off; but whether the average intelligence reflected in each vote will not be substantially higher than in the past, is the real point of interest for our profession and the public.

III. Some Current Suggestions for Change.

Let us now turn to a consideration of one or two bills affecting the election of judicial officers pending in the legislature, not so much with the idea of making effective criticism of these particular measures as of using them by way of illustration of certain practical points which the profession is likely to be called upon to consider more carefully than it generally has in connection with our elective system.

Assemblyman Murray's bill (Int. No. 23; Print No. 308) to minimize the partisan effect of our elective system upon judicial candidates. This bill takes from the parties all right to nominate at the primary judges of courts of record and of the Municipal Court of the City of New York, and provides that all such candidates shall be nominated by petition just as independent candidates for the general election are now put in nomination. Whether the bill intends that all such nominations shall be made separately from each other, or only separately from non-judicial offices, is not clear to me. Reduction is made in the number of signatures required for such nominations (very properly, in my opinion, for the present requirements are too onerous); and of special importance are the ballot provisions. While the use of any emblem to designate judicial candidates is expressly pro-

hibited, a decision of the question whether the name of a politica party may be used in connection with a candidate, is left t implication from other parts of the law (see Election Law, § 123 but I am inclined to believe that such use is prohibited by fa implication. A wholly separate ballot is also required. Unde this bill, therefore, the names of all elective judicial candidate would appear at the November general election, on a separat ballot, grouped under the titles of the respective judicial office without party names or emblems—just the names of the can didates themselves. The order of names (unwisely, it seems t me) is left to the determination of the local boards of elections for a general provision already in the Election Law (§ 331 subd. 3) gives to those officers the decision as to independen candidates, and under the theory of the Murray bill all judicia nominations are to be independent nominations.

The effect of such a measure would be threefold. (1) I would relieve the judicial candidate and his friends of the seriou labor and expense attendant upon any primary contest—a labo and expense which the best-qualified aspirant for judicial honor is often the least qualified to meet, and to which the *unsuccessfu* primary candidate may well be reluctant to subject himsel (2) It would likewise relieve the *successful* candidate from the wear and-tear of a double election. (3) It would put a desirabl emphasis upon the essentially non-partisan character of judicial election, both by minimizing the necessity of recourse t the party masters for a nomination, and by presenting the can didates' names to the electorate in a non-partisan form.

Personally I am inclined to believe that a separate ballot fo judicial officers, rather than a distinct and separate division upo the general ballot, is not necessary to this emphasis*; and I am very strongly inclined to believe that the creation of separat ballots, beyond the number absolutely necessary, is open t serious objections from the viewpoints of convenience and th safeguarding of the honesty of elections. But this is a questio somewhat beside the present purpose; and having considere

* The new Buffalo charter referred to in a previous note, which provide for the non-partisan election of certain municipal officers, places their name on the general ballot, but in a separate division.

the admirable intent of the Murray bill, let us turn to a suggestion which has appeared this year, I believe for the first time, among the bills at Albany.

Assemblyman Cristman's bill (Int. No. 378; Print No. 380) for the automatic renomination of judges. This bill provides in effect that whenever the term of a judge of a court of record is to expire, unless he shall affirmatively decline to run, his name shall go on the ballot for the November election among the candidates for the vacancy, without nomination of any sort.* This bill, like the Murray bill, provides for a separate judicial ballot, and prohibits the use of emblems. But the provisions of this ballot relating to the use of party names are peculiar. Any party is at liberty to nominate its own judicial candidates by the usual primary machinery; but the automatic candidate, if he be an enrolled member of any political party, may also use the name of that party to designate himself, the party's own choice as shown at the primary being distinguished by the addition to his name and that of the party of the words "primary candidate." But if any judicial candidate shall for any reason happen not to be enrolled (and while a judge who has succeeded in inducing a party to nominate and elect him is, under our system, likely to be an enrolled member of that party, the case is conceivable, especially as the provision applies to judges appointed to fill a vacancy as well), the bill extends to him the privilege of "wishing" himself onto any party that he may select, the implication being, however, that he may select but one; but no provision is included by which an indignant elephant, donkey or moose may throw off an unwelcome judicial rider.

There is little danger that the occasion will arise for the creation in our Association of a committee for the Prevention of Judicial Cruelty to Animals; but, seriously, were this suggestion of automatic renomination brought forward as an additional detail of the plan suggested by the Murray bill, I submit that it should be treated not only with respect, but with careful consideration.

* Later the same member introduced a bill providing for the automatic designation of judicial incumbents for the *primary*, as an alternative.

Another interesting suggestion,* not as yet made in any pending bill, but under discussion, is that of permitting the governor to nominate judicial candidates whose names shall go on the ballot with those of other judicial candidates, however nominated. The theory is that this would obviate some of the serious objections to the entry of judges into primary contests that in time it would give such prestige to the gubernatorially nominated candidates that party nominations in opposition would be less and less frequent and that the plan might prove almost an equivalent to gubernatorial appointment; and yet being but a mere change in the nominating machinery, could be brought about by legislation without constitutional amendment.

The weakest point in the New York system for electing judicial candidates has seemed to be, not the undiscriminating ballot, serious as that defect has been, but the original selection of the group from among whom the ultimately successful candidates must almost inevitably come. And the present handicap of a double election, operating inevitably, in the case of an office in which there is strong political, but slight popular, interest, in favor of the political machines, would seem to intensify the weakness at this critical point. One need not go back to the time when Chief Justice Bosworth was denied a renomination because he had rendered judicial decisions unsatisfactory to Tweed, or to the time when Judge Daly was denied renomination because he had refused to take orders from Croker as to the referees he should appoint. Judicial nominations and renominations have been and are being made and denied in our own day for considerations having only slightly greater weight when judged by the public and professional standards that ought to prevail. That the bench or bar has played and still plays so often the rôle of suppliant at the feet of a party dictator or ring remains an extraordinary and sinister page in our judicial history.

A logical corollary of the proposal to abandon an elimination contest between judicial candidates at the primary is the enactment of a system of preferential voting by which the voter may indicate from among several candidates the order of his choice

* Made by the New York Short Ballot Organization.

so that if his first choice cannot in any event be elected, his voice may still be counted for his next choice and against the candidate he particularly wishes to defeat. By this method the voter is enabled to express his personal preferences without reference to his guess as to how his neighbors will vote. Such an accomplishment would be highly desirable; but the practical difficulties inherent in such a system operating upon an electorate like ours,* and with our present electoral machinery, are very considerable. Even with the direct primary in effect, the question of a preferential vote is raised. Assemblyman Meyer has introduced a bill providing for this method of voting upon candidates generally, at the primary only, and this bill, of course, would include judicial candidates in its operation (Int. No. 657, Print No. 675). But for us perhaps the principal significance of such a bill lies in its suggestion of the incompleteness of our existing method of selection. Especially, does it not raise for the consideration of those who fear or believe that a preferential system is an impossibility, the question of the merits of our whole present system of nominating and electing judicial officers?

Notwithstanding the fact that the enactment of laws providing for the recall of unsatisfactory judges is generally regarded as somewhat remote in New York, and our pressing problem seems to be rather how to *call* those of the highest qualifications, recall bills including judicial officers among others, have been in the legislature for several years, and New York lawyers have given the subject of the Recall careful consideration. Unless I am greatly deceived, the sober judgment of a majority even of those who are least satisfied with the workings of our present system, is that it is a dangerous proposal, fraught with far greater harm than good. But this is a whole topic by itself, and it is only referred to here in order not to omit mention of an exceedingly important matter from a hasty review of the electoral questions affecting judicial candidates now pending in the legislature.

Various measures are pending in the legislature for the regula-

* Various western cities, including Cleveland, now have a preferential ballot. The new Olean, N. Y., charter, referred to in a previous note, provides for first, second and third choices. Under a statute just adopted in New Jersey governing municipal elections, the voter may express the order of his preference as to four candidates for the same office.

tion of campaign expenditures, both their purpose and amount. As we know, judicial candidates are already prohibited by the Penal Law (§ 780) from making contributions for nomination or election, but they are permitted to conduct a personal campaign, subject, however, to very strict limitation of the amount of their expenditures (§ 781). This limitation amounts to about three cents for each voter in the judicial district, or about enough to enable a candidate to send a single circular with a one-cent stamp to each person whose vote he solicits. One of the current bills (A. Int. No. 762; Print No. 797; Sulzer) would permit an expenditure of one-half this amount for the primary. Of course, in such case the class to be circularized would be smaller, including, as it does, only the voters enrolled in the particular party.

Another bill (S. Int. No. 633; Print No. 682; Simpson) would prohibit all expenditures by any candidate, judicial or other, save only for his own traveling and personal expenditures, and would limit these expenditures for both primary and election to the amounts limited in the last bill for the primary alone. It also undertakes to provide for what it terms "official literature" with respect to the merits and demerits of candidates and to limit everything that can legally be said on either side to "twenty folios of matter." The secretary of state, with the aid of the state printer—and the state treasury—is made the distributor of this campaign material. But it would be brutal to pursue the shy virtues of this bill into its remoter paragraphs.

Other bills stiffen our present corrupt practices act, and one (S. Int. No. 627; Print No. 676; Herrick) provides for forfeiture of office upon conviction of making a false statement as to election expenses, in analogy to the British and Canadian corrupt practices acts, which, however, go much further in the matter of forfeiture of office for electoral corruption than do our own.

Let this close this hasty review of the existing law and the pending amendments. I will only add that if I have had any success in suggesting the serious nature of some of the questions raised, it is evident that correct and final answers to them must depend largely upon an intelligent interest and an open-minded study of them on the part of our profession generally.